Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAVID KNIERIEM, as personal representative of the Estate of Troy Siade, deceased,

Petitioner,

vs.

GROUP HEALTH PLAN, INC., and BERNARD MANSHEIM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3)(B), a participant in an employee benefit plan may seek "other appropriate equitable relief." The question presented is whether a participant, who dies while attempting to seek injunctive relief to require a plan to pay for a medical procedure covered by the plan that could have saved his life, may then have his estate seek restitution or surcharge from the plan administrator as a breaching fiduciary for the cost of that medical procedure pursuant to 29 U.S.C. § 1132(a)(3)(B).

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OPINION BELOW

The opinion below by the United States Court of Appeals for the Eighth Circuit is reported at 434 F.3d 1058 (2006). The Eighth Circuit affirmed the unpublished judgment of the District Court that was entered on December 6th, 2004.

JURISDICTION

The Eighth Circuit filed its decision on January 19th, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

29 U.S.C. § 1132(a)

A civil action may be brought –

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

STATEMENT OF FACTS

Group Health Plan (hereafter the respondents will be referred to singularly and collectively as "GHP") insured Troy Siade ("decedent") under a health insurance plan.

Decedent, a 38 year old attorney, had been diagnosed with non-Hodgkin's lymphoma. Decedent had been advised by his health care providers that he must undergo a procedure known as allogeneic stem cell transplantation; specifically, that no other therapy offered the decedent an opportunity for a long-term disease-free survival. The undisputed evidence at a hearing on the preliminary injunction established this procedure would cost at least hundreds of thousands of dollars. Decedent subsequently died as a result of not having this procedure.

The health insurance policy issued by GHP provided coverage for this procedure; in fact, GHP had previously approved an almost identical procedure for coverage for the decedent, and had approved the necessary preliminary work for this procedure, including approving the necessary type-matching to locate a donor. GHP denied coverage for this procedure on the basis that it was "investigational and unproven," and therefore excluded by the policy. Respondent Mansheim, the Chief Medical Officer of Coventry Health Care, the parent corporation of GHP, was the individual who actually made this decision.

There was no attempt by GHP to establish whether this decision conformed with the definition of "Experimental, Investigational, and Unproven" established in the policy. Mansheim stated he did not use the definition set forth in the insurance policy, but instead the definition he established for the parent corporation.

GHP had a corporate policy of treating transplants differently than other medical procedures. Mansheim stated he would have denied both an autologous and allogeneic[1] stem cell transplant for the decedent for the same reason – that it was an experimental procedure. Yet the autologous stem cell transplant was approved for the decedent by Mansheim, as well as the search for a donor for the allogeneic procedure. The only difference between the two procedures for decedent was that the autogolous procedure would not work as well, while the allogeneic procedure could potentially cost three times as much as the autogolous procedure. There apparently was no articulated standard within GHP itself as to what was allowed under the policy, as Mansheim in the space of less than two months was not consistent in applying his own policy.

Mansheim stated that though he had approved allogeneic stem cell treatments for some patients with non-Hodgkins lymphoma, he had not approved the procedure for those with decedent's specific diagnosis. However, he based this on the wrong diagnosis for decedent. He characterized decedent's disease as "indolent," yet this diagnosis had been incorrect for several months in that the diagnosis had changed from "indolent" to "aggressive" – which prompted the recommendation of the stem cell transplant in the first place.

In response to this decision by GHP, Siade filed a request for a temporary restraining order and injunction,

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[1] The difference between the two procedures is whether a recipient donates his own stem cells or receives them from another living donor. Though labeled by the medical community as "stem cell" transplantation, it is actually the procedure commonly referred to as a bone marrow transplant. The doctors in this case had found a donor.

requiring GHP to cover the procedure. The hearing at which both the TRO and preliminary injunction were heard resulted in an order by the District Court denying the preliminary injunction, requiring a more "fully developed record" before the court could state "with any certainty" the likelihood of success on the merits. It should be noted that the time elapsed between the initial decision by Mansheim, the two levels of administrative review by GHP, and the hearing by the District Court on the preliminary injunction, was about a month.

The parties started the discovery process to provide the District Court that level of certainty. Simultaneously, Siade filed suit in state court against GHP and Mansheim, alleging medical malpractice and intentional infliction of emotional distress. The respondents removed this case to federal court, and after this Court's decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004), the suit was amended to bring Siade's claims within ERISA. In addition, Siade had passed away, and Knieriem, the personal representative of the estate, was substituted as Plaintiff.

In that amended Complaint, the estate alleged that GHP breached its fiduciary duty, and requested restitution and surcharge against the respondents. GHP filed a Motion to Dismiss, alleging that the damages sought were legal, not equitable. The District Court dismissed the Complaint. The Eighth Circuit affirmed.

REASON FOR GRANTING THE PETITION

REVIEW IS NECESSARY IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE COURTS OF APPEAL AND THIS COURT AS TO THE AVAILABILITY OF MAKE-WHOLE RELIEF AGAINST A BREACHING FIDUCIARY PURSUANT TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT ("ERISA")

The Court of Appeals in its opinion below expanded this Court's previous opinions beyond their permissible reach, finding that suits against fiduciaries and non-fiduciaries under ERISA have the same standard. The court below unnecessarily expanded this Court's decisions in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), to limit ERISA claims against fiduciaries. This issue arises out of what the term "equitable" means in 29 U.S.C. § 1132(a)(3)(B) in the context of the other provisions of ERISA that recognize the special role of fiduciaries.

1. The problem the Petitioner faced here is that within the confines of ERISA, 29 U.S.C. § 1132(a)(3)(B) is the only avenue available for the remedy sought. Relief under 29 U.S.C. § 1132(a)(1) is only available to seek current obligations of an ERISA-governed plan, while courts have limited 29 U.S.C. § 1132(a)(2) to suits brought on behalf of the plan. If there is no relief available under section a(3)(B), then Petitioner has no recourse available for make-whole relief. It does not overstate the case by much to say that without finding this relief available, the plan administrator (who was also the insurer, and had a financial stake in the decision) could allow beneficiaries to die in order to avoid paying claims.

This make-whole relief is a goal consistently espoused by the United States Department of Labor, the agency responsible for enforcing ERISA. In its *Brief for the United States as Amicus Curiae* in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the United States succinctly made the case why the Court of Appeals below incorrectly interpreted this Court's precedents:

> After *Great West*, the government has taken the position in several cases pending in the courts of appeal that Section 502(a)(3) allows at least some forms of "make-whole" relief against a breaching fiduciary in light of the general availability of such relief in equity at the time of the divided bench. Historically, a beneficiary's claim against a trustee for a breach of trust was typically remedied *exclusively* in the courts of equity because the beneficiary had only an equitable, not a legal interest, in the trust and its assets. See Restatement (Second) of the Law of Trusts §§ 2 cmts. e and f, 197 (1959). A beneficiary therefore could maintain a suit in equity to obtain various forms of relief, including to compel the trustee to perform his duties as trustee, to enjoin the trustee from committing a breach, and "to compel the trustee to redress a breach of trust." *Id.* § 199(a)-(c). The trustee's liability in the event of a breach gave rise to various alternative remedies, including a remedy that "will put [the beneficiary] in the position in which he would have been if the trustee had not committed the breach of trust." *Id.* § 205 & cmt. a. A monetary recovery in those circumstances did not require a showing of unjust enrichment. See, *e.g.*, *id.* § 205, cmt. c; *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.*, 266 F.3d 574 (7th Cir.

> 2000); see generally George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* 861 at 3-4 (rev. 2d ed. 1995). Neither *Great West* nor *Mertens* supports the proposition that Congress intended that the courts should ignore that settled trust law understanding dating from the days of the divided bench.

Brief of the United States at 27-8n.13.

Under the law, this make-whole relief is available. If this make-whole relief is not available, Petitioner has no remedy in this case.

This is not just of passing interest. The circuit courts have consistently expanded this Court's decisions on non-fiduciaries to include within their ambit suits against fiduciaries. *See, e.g., Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1010-11 (9th Cir. 1998). As the United States noted above, this is simply not the law, and this Court needs to correct the errant interpretation of this Court's opinions.

This is not, in addition, an invitation to "open the floodgates" of ERISA litigation. What Petitioner seeks here is not compensatory damages, or extracontractual damages. Instead, it is a carefully limited remedy that places no additional burden on the financial resources of a plan, nor should make plans more expensive or limit access to them by participants or employers. This suit merely seeks the equitable jurisdiction of this Court to correct the error made by the plan administrator; the only cost to the plan would be the outlay that the plan would have made if the plan administrator had not breached its fiduciary duty.

2. Does the lack of the decedent or estate incurring the medical charges eliminate liability, as the court below